IN THE

Supreme Court of the United States

October Term, 1940.

No. 372.

WILLIAM G. WALL,
Petitioner,

vs.

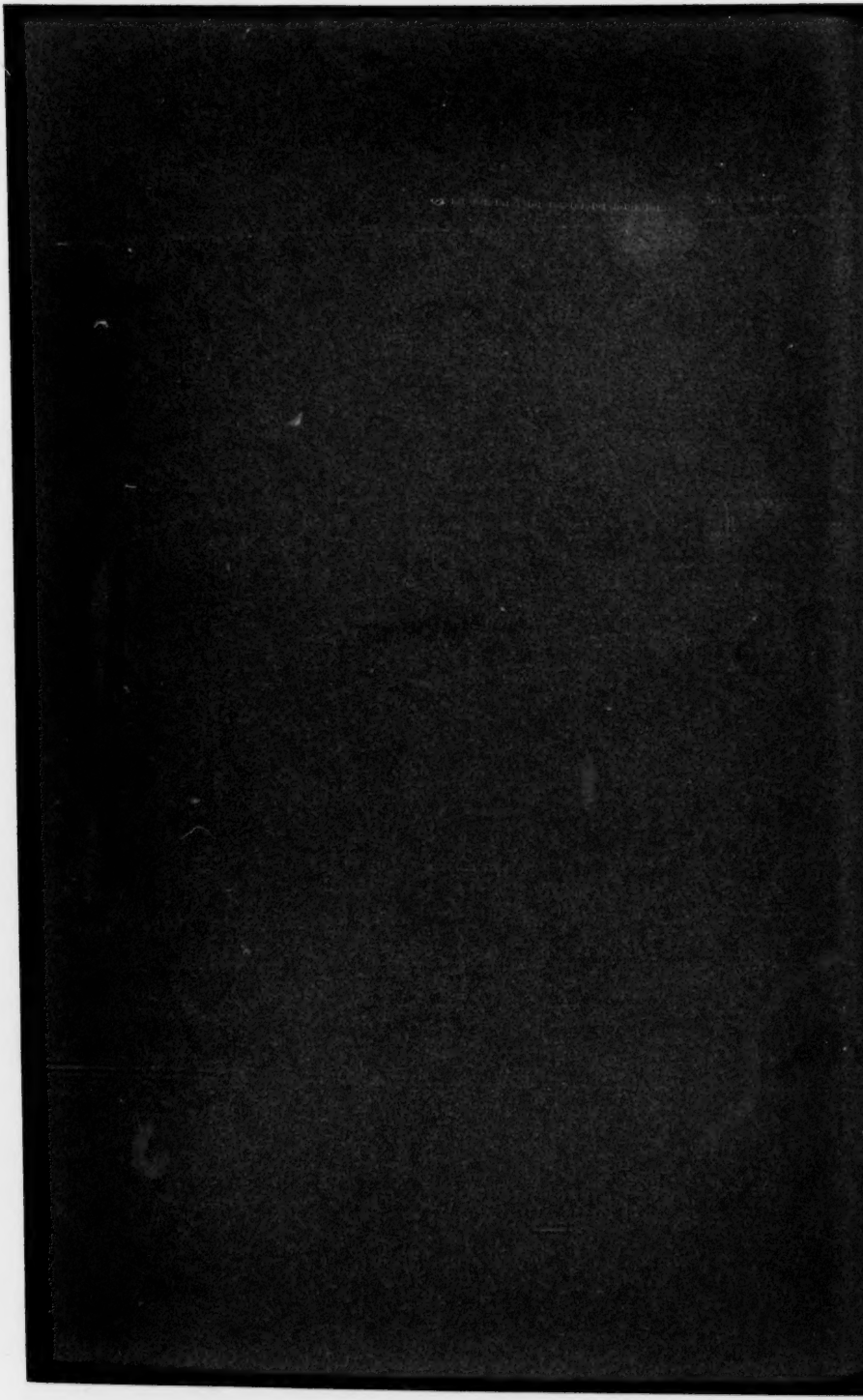
STATE BOARD OF BAR EXAMINERS OF THE STATE OF NEW JERSEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Joseph Lanigan

DAVID T. WILENTZ,
Attorney General of New Jersey,
Attorney for Respondent,
State House, Trenton, N. J.

MacCrellish & Quigley Co., Printers, Trenton, New Jersey



INDEX

TABLE OF CASES

RULES OF THE NEW JERSEY SUPREME COURT

IN THE

Supreme Court of the United States

October Term, 1940.

No. 372.

WILLIAM G. WALL, *Petitioner,* vs. STATE BOARD OF BAR EXAMINERS OF THE STATE OF NEW JERSEY, *Respondent.*	On Certiorari.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The petitioner, William G. Wall, a practicing lawyer of the State of New York for over ten years, took and failed in the April 1939 examinations for admission to the bar of New Jersey. In September, 1939, William G. Wall, by petition to the New Jersey Supreme Court, sought "a review and re-marking of his examination papers on the April 1939 bar examination, and in the alternative, leave of the Court to direct the Clerk of the Supreme Court to add his name to the list of those who desire to take the examination to the New Jersey Bar on October 19, 20, 1939." (*R. 1.*) The matter came on to be argued by peti-

tioner at the October Term, 1939. In a *per curiam* opinion the New Jersey Supreme Court found "no fault with the result reached by the Board of Examiners determining that the petitioner had failed to pass such examination," and held that under its rule 9 (a), petitioner was not relieved from serving a clerkship of at least four months during the time intervening since the taking of his last prior examination, and that he must comply with rule 9 (a) before being admitted to take another examination (*R. 50*). Rule 9 (a) is as follows:

> "9 (a). When any applicant, including those applying under rule 6, (foreign attorneys) has taken an examination for attorney and failed in the same, he must, before he can take another examination, file with the Clerk of this Court proof that he has served a clerkship of at least four months during the time intervening since the taking of his last prior examination." (*Dec., 1924.*) (*Amended Feb., 1931.*)

The petitioner appealed to the New Jersey Supreme Court for reconsideration, under date of November 3, 1939 (*R. 51*), which was denied on November 17, 1939 (*R. 57*). He thereupon appealed to the New Jersey Court of Errors and Appeals (*R. 59*), "upon the grounds that the said New Jersey Supreme Court erred in affirming the decision and judgment of the New Jersey State Board of Bar Examiners and that the Supreme Court erred in denying petitioner-appellant relief in the within cause."

The matter before the New Jersey Supreme Court turned largely upon the construction and application of its rule 9 (a) hereinbefore quoted, requiring those who had failed in an attorneys' examination, before taking another examination, to serve clerkships of at least four months during the time intervening since the taking of the last prior examination. The petitioner stressed the point that the New Jersey Supreme Court erred in its construction of its rules and their application to him and erred in refusing him the relief which he sought in that court. In opposition

it was contended that these issues were not properly before the New Jersey Court of Errors and Appeals, and that such issues were entirely within the powers and jurisdiction of the New Jersey Supreme Court. The New Jersey Court of Errors and Appeals decided the issue adversely to the petitioner in an opinion dated April 25, 1940. (*R. 64.*)

ARGUMENT.

I.

The sole power to examine persons for admission to the Bar in New Jersey is vested exclusively in the New Jersey Supreme Court.

Mr. Justice Garrison, speaking for the New Jersey Supreme Court, sitting in *banc*, in *In re Harris, 88 N. J. L., page 18, at page 21,* summarized and followed the holding of our leading New Jersey case on the subject of the "distinctive attribute" of the Supreme Court in the matter of admission of persons to practice law, in the following language:

> "In the case of *In re Branch, 70 N. J. L. 537,* it was pointed out that in New Jersey the admission of attorneys is regulated by a local common law peculiar to this State, which, arising prior to the year 1776, had in the year 1844 become a distinctive attribute of the Supreme Court and constituted one of those 'powers' which the Constitution of that year declared 'except as herein otherwise provided shall continue as if this constitution had not been adopted.' *Article 10, paragraph 1.*"

As phrased in the *Branch case at page 575,* "it was, in fine, one of those 'powers,' which in addition to its 'jurisdiction,' that Court was, by that instrument, authorized to continue unless other provision was made therefore by the Constitution itself, which was not done." The mere fact that this "power" originated in custom is without significance. As stated in the *Branch case at page 575,* "nor

does the fact that the power in question is not specifically mentioned militate against its continuance." The *Branch* case held that the power of the Supreme Court to examine persons whom it might recommend for license from the Governor, was not subject to derogation by the Legislature.

While attorneys are officers of the Court and removable by the Court, in New Jersey, attorneys are not admitted to practice by the Supreme Court. They are commissioned or "licensed" by the Governor when he is assured that such licensees are possessed of the proper qualifications by recommendation to that effect from the Supreme Court. *In re Branch, 70 N. J. L. 537, at page 570. In re Raisch, 83 N. J. Eq. 82.*

The recommendation of the Supreme Court is based on an examination held by the Court, or under its supervision, under rules promulgated by it which, through the years, have been changed and modified by the Supreme Court in its absolute discretion, to meet the varying conditions and requirements of the periods for which such rules were adopted. This practice has been followed from the earliest period and has been a "distinctive attribute" of the Supreme Court, and, as such, existed in unqualified form at the time the Constitution was adopted and has been recognized and continued ever since and has never been judicially or legislatively emasculated.

II.

The New Jersey Court of Errors and Appeals has no authority to review the judgment of the New Jersey Supreme Court regarding qualifications of candidates for admission to the Bar.

The petitioner has cited *In re Hahn, 85 N. J. Eq. 510; 96 Atl. 589,* in support of his contention that this matter was appealable to the New Jersey Court of Errors and Appeals, but the *Hahn* case is only authority for the proposition that an order of the Court of Chancery, which debarred *(sic)* one from practice as solicitor and counsellor therein

was appealable because the Court of Chancery lacked jurisdiction to make such an order. The New Jersey Court of Errors and Appeals, speaking by the late Mr. Justice Swayze, said at page 514:

> "Whatever doubt there may be as to the right of appeal from a mere disciplinary order, there can be no doubt as to the appealability of such an order as this if the Court of Chancery was without jurisdiction to make it, since if this Court cannot restrain the excess of jurisdiction, no Court can, and the usurpation of power, if there is any would go uncorrected."

The New Jersey Court of Errors and Appeals concluded that the power to make the rule denying the petitioner's application was clearly inherent in the New Jersey Supreme Court and that the said Supreme Court was the only tribunal that was vested with the jurisdictional authority to enter the aforesaid rule (*R. 50*). Therefore the difference between the "excess of jurisdiction" and the "usurpation of power" by the Court of Chancery in the *Hahn* case is clearly differentiated from the instant case before this Court.

The petitioner also cites *In re Cosey, 85 N. J. Eq. 599; 96 Atl. 595* (*Petitioner's brief, p. 35*) but this case, like the *Hahn* case related to the disbarment of an attorney involving the same question of jurisdiction as the *Hahn* case; and the motion to dismiss the appeal in the *Cosey* case was denied for the reasons which appear in the *Hahn* opinion. The *Hahn* and *Cosey* cases have no relevancy to support petitioner's contention of the appealability of a Supreme Court order concerning the admission of attorneys.

This Court has repeatedly decided that it will disregard any challenge directed to the correctness of various rules of the State Court as to the meaning and effect of statutes enacted by the States and rules and regulations which the State may properly promulgate. Mr. Justice White, de-

livering the opinion in *Missouri, K. & T. Ry. Co.* v. *McCann, 174 U. S. 580; 19 Sup. Ct. 755, at page 758,* said:

> "The reasoning now relied on, then, is that * * * this Court should disregard the interpretation given to the State statute by the Court of last resort of the State, and hold that the statute means the very contrary of its import as declared by the Supreme Court of the State, and upon such construction decide that the State law is repugnant to the Constitution of the United States. But the elementary rule is that this Court accepts the interpretation of the statute of a State affixed to it by the Court of last resort thereof." *Sioux City, O. & W. Ry. Co.* v. *Manhattan Trust Co., 172 U. S. 642; 19 Sup. Ct. 879,* and authorities there cited.

This doctrine was cited with approval by Mr. Chief Justice Fuller in *Tullis* v. *Lake Erie & Western R. Co., 175 U. S. 348; 20 S. Ct. 136,* and has continued to receive the approbation of this Court and in *State of Missouri ex rel. Hurwitz* v. *North et al., Board of Health of State of Missouri, 271 U. S. 40; 46 S. Ct. 384, at page 385,* Mr. Justice Stone, speaking for this Court, declared:

> "Plaintiff's assignments of error assail the correctness of various rulings of the State Court as to the meaning and effect of the statute drawn in question. These assignments must be disregarded here, as upon writ of error to a State Court we are bound by its construction of the State law." See *West* v. *Louisiana, 24 S. Ct. 650; 194 U. S. 258; 48 L. Ed. 965; Gatewood* v. *North Carolina, 27 S. Ct. 167; 203 U. S. 531, 541; 51 L. Ed. 305; Watson* v. *Maryland, 30 S. Ct. 644; 218 U. S. 173; 54 L. Ed. 987; Schneider Granite Co.* v. *Gast Realty Co. 38 S. Ct. 125; 245 U. S. 288, 290; 62 L. Ed. 292.*

We insist that the inherent, constitutional and exclusive power of the New Jersey Supreme Court in the matter of admission of attorneys, lies wholly within the discretion of that Court and cannot be impaired, contracted or reviewed

by the New Jersey Court of Errors and Appeals; and therefore the petition for writ of certiorari in the instant matter should be dismissed.

III.

No Constitutional questions are herein presented.

(*a*) *Petitioner should be required to serve a clerkship in New Jersey.*

The petitioner contends that he should be given the benefits of the New Jersey Supreme Court rules in existence prior to February 14, 1931, and that having "matriculated in an approved law school" on September 16, 1925, and graduating therefrom on June 12, 1928, prior to the promulgation of Rule 11 in 1931 (*App. A*), he was not therefore required to serve a clerkship. It is maintained by the petitioner that the direct application of Rule 11 to him results in denying him the privileges and immunities guaranteed to citizens of the United States under section 2, paragraph 1 of article 4, and section 1 of Amendment Fourteen of the United States Constitution.

Now in view of these rules and regulations (*App. A*) what right, privilege or immunity is extended to the practicing attorneys of other States to become practitioners in the State of New Jersey that is not likewise extended to attorneys and counsellors-at-law of the State of New York? Obviously there is none and the petitioner has not been subjected to any different regulation. Nor have the petitioner's privileges and immunities been abridged within the first section of the Fourteenth Amendment. If the service is public the State may prescribe qualifications, and require an examination to test the fitness of any person to engage in and remain in the public calling. *Smith v. Texas, 233 U. S. 630, 636; 34 S. Ct. 681; 58 L. Ed. 1129; L. R. A. 1915 D, 677, Ann. Cas. 1915 D, 420.*

The case of *Dent* v. *West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623* is peculiarly instructive as it pertains to the power of the State to exact reasonable tests touching the qualification and fitness of applicants as a prerequisite to receiving the license of the State to engage in a public calling. It cannot be denied that an attorney's calling is public in character. He is an officer of the Court and his services are to the public. Surely the petitioner has not been treated differently from any other citizen from another State applying for license to practice law in this State. The requirements which the petitioner must meet are neither exceptional nor discriminatory; nor does the procedure prescribed deny to the petitioner the equal protection of the law.

It is to be noted that the petitioner did not apply for admission to the New Jersey bar examination until the April Term, 1939. Therefore, if a certain character, scholastic, and clerical standard had been established for attorneys of other States and such requisites were to remain in existence until October 1, 1931, and there had not been a full compliance on that date, then not even a privilege has been conferred and certainly no vested right has accrued. The petitioner cannot claim the benefits attaching to rules that have expired before he has attained their specific qualifications.

> One who asks the privilege of admission to the bar is simply seeking to obtain a right of property which he has not got. *In re O'Brien's Petition, 63 Atl. Rep. 777, at page 780.*

Rule 11 of the New Jersey Supreme Court provides that the ten preceding rules "shall not be deemed to affect the rights of candidates for admission as attorneys who * * * have matriculated in an approved law school prior to the date of promulgation, to wit, February 14, 1931 * * * except that these rules where applicable to attorneys of other States shall take effect October 1, 1931" (*App. A*).

In *Butcher et al* v. *Maybury, 8 Fed. (2d) 155, 159, Circuit* Judge McCamant in speaking for the Court, said:

> "The Legislature may prescribe qualifications, both as to character and learning, which will require those in practice to give up their occupation." *Dent* v. *West Virginia, 129 U. S. 114, 9 S. Ct. 231; Hawker* v. *New York, 170 U. S. 189, 18 S. Ct. 573, 42 L. Ed. 1002.*

This Court in *Hawker* v. *People of New York, 170 U. S. 189; 18 S. Ct. 573,* in speaking through Mr. Justice Brewer has declared, page 576:

> "It is not the province of the Courts to say that other tests would be more satisfactory or that the naming of other qualifications would be more conducive of the desired result."

Consequently the New Jersey Supreme Court was within its province of establishing certain definite qualifications in the January Term, 1938, and all applicants thereafter, including the petitioner in this cause, must meet the said requirements.

Our New Jersey Supreme Court deemed it necessary for an unsuccessful applicant to supplement his earlier clerkship with an additional four months to be served between the unsuccessful examination and the examination to which he may thereafter be admitted. Commenting on this phase of the litigation, the Court in *In re Meigs, 9 N. J. Misc. 234,* at page 235, said:

> "The very fact of their admission elsewhere and their failure here suggests that their deficiency is in that very practice and procedure which would be the heart of a New Jersey clerkship."

The petitioner very strongly urges that the opinion in *In re Natelson, 3 N. J. Misc. 549; 129 Atl. 183* relieves him of serving a clerkship between the examination that he failed and the next examination to which he may be admitted. It is to be observed that the *Natelson* case was

decided May 18, 1925, by the New Jersey Supreme Court and at that time there was promulgated the rules of the Supreme Court and rules of the State Board of Bar Examiners that had been revised July, 1924. In the rules before the New Jersey Supreme Court in the *Natelson* case for judicial construction, there was no provision requiring an attorney or counsellor-at-law from a foreign State to serve a clerkship after said applicant had failed to pass the New Jersey bar examination. Subsequent to the *Natelson* case, the rules of the Supreme Court of the State of New Jersey were revised in the January Term, 1938 and the present rule 9 (a) was adopted (*App. A*).

The petitioner contends that rule 9 (a) of the Supreme Court requiring clerkship of at least four months following his failure to pass the bar examination, has no application to him. Our New Jersey Supreme Court ruled directly on this question and declared that said rule did apply to the petitioner (*R. 50*). The New Jersey Courts having construed the application of the foregoing rule, the petitioner is precluded from having the same subject matter again adjudicated in this Court.

(*b*) *The right to practice law in State Courts is not such a privilege or immunity of a citizen of the United States as is guaranteed by the Fourteenth Amendment.*

After considering the rights, privileges or immunities secured by the Constitution and Laws of the United States and the right to practice in the Courts of a State, Mr. Justice Miller in speaking for this Court in *Bradwell* v. *Ill, 16 Wall. 130,* said:

> "But the right to the admission to practice in the Courts of a State is not one of them. This right in no sense depends on citizenship of the United States."

And also in the case of *Duncan* v. *Missouri, 152 U. S. 377; 14 S. Ct. 572,* this Court said:

> "Due process of law and the equal protection of the law are served if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government."

It cannot be said that there was any discrimination against this petitioner that would show he was not subject to the same rule as any other attorney or counsellor-at-law without the State of New Jersey. As in the case of *State of Missouri, ex rel. Hurwitz* v. *North et al., Board of Health of State of Missouri, supra,* this Court declared:

> "Nor did the statute deny to the plaintiff in error the equal protection of the laws. A statute which places all physicians in a single class, and prescribes a uniform standard of professional attainment and conduct, as a condition of the practice of their profession, and a reasonable procedure applicable to them as a class to insure conformity to that standard, does not deny the equal protection of the laws within the meaning of the Fourteenth Amendment." *Dent* v. *West Virginia, 9 S. Ct. 231; 129 U. S. 114; 32 L. Ed. 623; Reetz* v. *Michigan, 23 S. Ct. 390, 188 U. S. 505, 47 L. Ed. 563; Watson* v. *Maryland, supra.*

Certainly the attorneys and counsellors-at-law from foreign jurisdictions are placed in a single class and this rule is applicable to them as a class to insure conformity to that standard and therefore does not deny the equal protection of the laws within the meaning of the Fourteenth Amendment.

This Court has previously disposed of the petitioner's claim in this matter that he has been denied the privileges and immunities guaranteed to the citizens of the several States, in *Ex parte Lockwood, 154 U. S. 116; 14 S. Ct. 1082.* In that case the Code of Virginia, 1887, provides that "any person duly authorized and practicing as attorney at law in any State or territory of the United States, or in the District of Columbia, may practice as such in the Courts of this State (*section 3192*); and that every such person shall produce satisfactory evidence of his being so authorized, and take a prescribed oath (*section 3193*)". On the foregoing statutory enactment an application was made to the United States Supreme Court by Belva A. Lockwood for leave to file a petition for a writ of man-

damus, requiring the Supreme Court of appeals of Virginia to admit her to practice law in that Court; and she alleged that the only reason for rejection of her application was that she was a woman. Mrs. Lockwood had been for many years a member of the Bar of the United States Supreme Court and of the Supreme Court of the District of Columbia and the Bars of several other States in the Union. She had applied to the Supreme Court of Appeals of Virginia to be admitted to the practice of law in that Court and the Court denied her application. Mr. Chief Justice Fuller in delivering the opinion for this Court declared:

> "Our interposition seems to be invoked upon the ground that petitioner has been denied a privilege or immunity belonging to her as a citizen of the United States, and enjoyed by the women of Virginia, in contravention of the second section of article 4 of the Constitution, and of the Fourteenth Amendment."

It was therein decided that:

> "It was for the Supreme Court of Appeals to construe the statute of Virginia in question, and to determine whether the word 'person' as therein used is confined to males, and whether women are admitted to practice law in that commonwealth."

Leave was denied by the United States Supreme Court.

The *Lockwood* case being analogous to the instant matter before this Court and it being manifest that the New Jersey Supreme Court had the sole power to adjudicate the questions herein presented, the petition for this writ of certiorari should be denied.

CONCLUSION.

The application for the writ of certiorari should be denied.

Respectfully submitted,

DAVID T. WILENTZ,
Attorney General,
Attorney for Respondent,
State House,
Trenton, New Jersey.